

1982 S.C. Op. Atty. Gen. 25 (S.C.A.G.), 1982 S.C. Op. Atty. Gen. No. 82-21, 1982 WL 154991

Office of the Attorney General

State of South Carolina

Opinion No. 82-21

April 6, 1982

*1 Honorable Dewey Wise

Member

South Carolina Senate

Post Office Box 142

Columbia, South Carolina 29202

Dear Senator Wise:

In response to your request for an opinion from my Office regarding a proposed amendment to the South Carolina Constitution which, if approved and ratified, would provide for the automatic suspension from office of a legislator upon indictment, I can advise you as follows:

1. In my opinion, such a provision would not conflict with the equal protection clause of the Fourteenth Amendment to the United States Constitution which requires equal representation. The 'one man-one vote' rule requires that no voter shall exercise, in the selection of the legislature, a greater voting power than other voters. See generally, Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964). Equality of representation, then, is constitutionally required in the election of the legislature; however, a temporarily unoccupied legislative seat, which seat was originally filled pursuant to the 'one man-one vote' rule, does not result in constitutionally-proscribed unequal representation. That constituents of a suspended legislator would not be physically represented during the period of suspension is no different from the vacuum created during the period between the vacancy of a legislator's seat due to death or resignation (or any other ground under [Article III, Section 25 of the South Carolina Constitution](#)) and the holding of a special election to select a successor for the remainder of the term. This unavoidable unoccupancy does not result in unequal representation within the constitutional prohibition.

2. In my opinion, a provision which would vest in the Governor the power to appoint a temporary replacement for a suspended legislator may be constitutionally suspect because of the separation of powers language of [Article I, Section 8 of the South Carolina Constitution](#) and language of [Article I, Section 8 of the South Carolina Constitution](#) and because of the autonomous control of the legislature over its membership provided by [Article III, Section 12](#) thereof. Nevertheless, there is authority for the argument that a Governor can appoint a temporary successor for any 'public office.' See Generally, 38 AM.JUR.2d Governor § 6. Indeed, [Section 8-1-100, CODE OF LAWS OF SOUTH CAROLINA, 1976](#), as amended, provides that the Governor may suspend '[a]ny State . . . officer. . . .' [emphasis added] and [Article V, Section 14 of the State Constitution](#) authorizes the Governor to fill a vacancy in the South Carolina Supreme Court or in the circuit courts if the unexpired portion of the term does not exceed one year. Furthermore, if such authority is provided in an amendment to the Constitution, any potentially conflicting provision can (and must) be read harmoniously [[Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 \(1974\)](#)] to the end that the amendment would constitute an express exception to the potentially conflicting provision. Cf., McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977). Nevertheless, inasmuch as the suspension of an official pending his trial for criminal conduct is accepted as fair and often necessary in order 'to tie his hands for the time being' [63 AM.JUR.2d [Public Officers and Employees](#) § 255 at 778], perhaps the better practice would be to leave the seat unoccupied until conviction.¹

*2 3. In my opinion, appropriate language in such a constitutional provision might include language similar to that contained in [Section 8-1-100 of the Code](#) as follows:

Any member of the General Assembly who is indicted in any court for any crime [OR 'for any felony'] shall be suspended by the presiding officer of the house of which he is a member until he shall be acquitted. In case of conviction the office shall be declared vacant by the presiding officer of the house of which he is a member and the vacancy filled as provided by [Section 25](#) of this article. [OR 'In case of conviction, the house of which he is a member shall, with the concurrence of two-thirds, expel him.']

An alternative would be language similar to that contained in [Article VI, Section 8 of the South Carolina Constitution](#) as follows: Any member of the General Assembly who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such presentment if permitted by law shall be suspended by the presiding officer of the house of which he is a member until he shall have been acquitted. In case of conviction the office shall be declared vacant by the presiding officer of the house of which he is a member and the vacancy filled as provided by [Section 25](#) of this article.

I would also suggest that the term 'conviction' be expressly defined in any proposed constitutional amendment which will provide for action to be taken as a result of the commission of a crime by a legislator.

With kind regards,

Daniel R. McLeod
Attorney General

Footnotes

¹ In Vanderbach v. Hudson County Board of Taxation (N.J.), 42 A.2d 842 (1945), affirmed [45 A.2d 142 \(1946\)](#), the court discussed the purpose of suspension pending trial as follows:

Note 2 Cases may be readily imagined where the continuance of the incumbent in office during the course of the . . . proceedings would seriously disadvantage the public. It might well interfere with official function in substantial particulars; and it might also hamper the investigation of the alleged misbehavior. 42 A.2d at 850.

. . . [t]he suspension was not by way of punishment and in its intendment and effect was not indefinite. It was in its purpose and outworking a detachment from duty pending trial and decision. . . . [45 A.2d at 149.](#)

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